

THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF ENVIRONMENTAL SERVICES  
WASTE MANAGEMENT COUNCIL

In re: North Country Environmental Services, Inc.  
Standard Permit No.: DES-SW-SP-03-002

Docket #03-05WMC

RECEIVED

MAY 12 2003

**OBJECTION TO MOTION TO CONTINUE APPEAL**

North Country Environmental Services, Inc. ("NCES") objects to the motion to continue appeal filed by the Town of Bethlehem (the "Town"). This objection rests on the following grounds.

**Introduction**

The Town seeks to stay this appeal pending the outcome of any appeal to the New Hampshire Supreme Court of the Grafton Superior Court's Order on the Merits in NCES v. Town of Bethlehem, Docket No. 01-E-0177. Such a stay would likely result in two appeals to the supreme court, disrupt the availability of waste disposal capacity for the more than 60 New Hampshire towns that depend on the landfill, and irreparably harm NCES's business. Having commenced this appeal, the Town should be required to either withdraw or proceed with it.

**Argument**

A motion to stay proceedings before the council is addressed to the council's discretion. *See Johns-Manville Sales Corp. v. Barton*, 118 N.H. 195, 198 (1978). Even if there is another action pending between the same parties for the same causes of action, however, there is no justification for a stay of the action. *Id.*, citing Pacific & Atlantic Shippers v. Schier, 106 N.H. 69, 70 (1964).

Federal courts have devised seven criteria to govern whether to grant a stay of a proceeding because of the pendency of another case before another court.

These considerations include: (1) comity, (2) promotion of judicial efficiency, (3) adequacy and extent of relief available in the alternative forum, (4) identity of the parties and of the issues in both actions, (5) likelihood of prompt disposition in the alternative forum, (6) convenience of the parties, counsel, and witnesses, and (7) possible prejudice to a party as a result of the stay.

Manchester Bank v. Connecticut Bank and Trust Co., 497 F. Supp. 1304, 1318 (D.N.H. 1980).

Several of these criteria presuppose an alternative forum to that weighing the motion to stay; in this case, the supreme court is not an alternative to the council, so those criteria premised upon an alternative forum (i.e., criteria 1, 3, 5, and 6) have no applicability here.

The remaining three criteria, however, provide guidance to the council in its evaluation of the town's motion. Two of the three criteria clearly favor denying the stay, while the third has at best a neutral effect upon the analysis.

*- Identity of Parties and Issues*

On appeal of the superior court's order, the parties will be the Town and NCES. In the proceeding pending before the council, the parties are the Town, NCES, and the Waste Management Division. Thus, while there is some identity of parties, that identity is not complete.

More importantly, however, the issues on appeal from the superior court will be entirely different from those before the council. In the superior court action, the court ruled upon the validity of certain Town zoning ordinances. In the action before the council, the Town alleges that the division made errors in granting the Stage IV permit. There is no identity between the issues pending before the council and those that will be presented to the supreme court.

The evident rationale of this criterion is that a stay is more reasonable if the resolution of the second case will also resolve the issues in the proceeding that was stayed. Application of this criterion, then, militates against a stay of the council proceedings.

*- Prejudice as a Result of the Stay*

NCES and its predecessors have operated a landfill on the Bethlehem site for 27 years. Since 1987, the landfill has been a double-lined subtitle D facility with increasingly sophisticated systems for the management of leachate and landfill gas. Over 60 New Hampshire communities rely upon the NCES facility for disposal of their municipal solid waste. Affidavit of R. Scott Shillaber, P.E. (Exhibit A). Over 90% of the waste disposed of at the NCES landfill comes from New Hampshire.

NCES is currently filling the cell known as Stage III of the landfill. Under its DES permit, Stage III will reach capacity in June 2005. To ensure continuity of waste disposal, however, construction of Stage IV must begin in the Fall of 2003 (with most of the work to be completed in the 2004 construction season), and the first layer of waste must be laid in Stage IV beginning in November 2004. Id.

From start to finish, a supreme court appeal takes from 12 to 18 months on average. If the council were to stay the Town's appeal as it has requested, the stay would not be lifted until *after* NCES must begin construction on Stage IV or perhaps even after NCES must begin placing waste in Stage IV. Thus, if NCES were to prevail before the supreme court, it would be faced with the prospect of proceeding with construction and operation of Stage IV while litigating before the council – and probably the supreme court again – whether its permit was validly issued.

Like any business, NCES will not undertake a project as extensive and costly as construction of an 11.05-acre landfill cell without establishing that it is legally authorized to do so. Thus, the practical effect of a stay will be to delay the construction of Stage IV for as long as it takes for the council to rule and the supreme court to review that ruling. Assuming the council rules in as little as three months and the supreme court review takes only a year, the results would be devastating to NCES and the communities that depend upon the landfill for their disposal needs, as the following timeline demonstrates:

<b><u>Event</u></b>	<b><u>Approximate Date</u></b>
Notice of Appeal of Superior Court Ruling Filed in Supreme Court	June 2003
Construction Must Be Underway on Stage IV to Provide Continuous Waste Disposal	April 2004
Supreme Court Decision on Appeal of Superior Court Ruling	June - December 2004
Earliest WMC Appeal Reactivated	June 2004
WMC Decision on Town's Appeal (Earliest)	September 2004
Notice of Appeal of WMC's Decision Filed with Supreme Court After Rehearing	November 2004
NCES Must Begin to Place Waste in Stage IV to Provide Continuous Waste Disposal	November 2004
Stage III Permitted Capacity Expires	June 2005
Supreme Court Decision on Appeal of WMC Decision (Earliest)	November 2005
Construction of Stage IV Completed	Spring 2006

Thus, in the best case scenario, if the stay were granted, the NCES landfill would be shut down for at least nine months even if NCES prevails on all of its appeals. The dozens of North Country communities dependent upon the facility would have to reroute their waste to far more distant facilities, increasing their costs. In addition, NCES would suffer substantial erosion of its customer base as those customers are forced to look elsewhere for disposal capacity.

This prejudice can be greatly mitigated if not eliminated if the council were to go forward with the Town's appeal. NCES would agree to an expedited consideration of the appeal so that any supreme court appeal of the council's decision can be consolidated with the appeal of the superior court order. This would eliminate consecutive appeals and give NCES the opportunity to continue serving its customers.

Applying the second Manchester Bank criterion, therefore, strongly supports the denial of the Town's motion to stay.

*- Judicial Efficiency*

Where the outcome of a second proceeding would be necessarily dispositive of the outcome of another proceeding, there is greater justification to impose a stay. *But see Johns-Manville*, 118 N.H. at 198. Where only one *possible* outcome of the second proceeding may be dispositive of the stayed proceeding, however, there is no such justification.

Here, if the superior court's ruling were upheld in its entirety, the Town's zoning ordinance prohibiting the expansion of the landfill into Stage IV would be deemed valid. The Town assumes that such a decision would moot the appeal before the council, but that is not the case. Even a use prohibited by a zoning ordinance can be permitted by a variance from the town's zoning board of

adjustment. *See generally* P.J. Loughlin, *15 New Hampshire Practice: Land Use Planning and Zoning*, §24.02 (3<sup>rd</sup> ed. 2000). The supreme court, moreover, has now liberalized the standards governing the issuance of variances in recognition of the extensive protection afforded property rights by the New Hampshire Constitution. Simplex Tech., Inc. v. Town of Newington, 145 N.H. 727, 731 (2001). Thus, it is possible that the supreme court could rule against NCES and NCES could still proceed with construction of Stage IV.

If the supreme court rules in favor of NCES, of course, the court could remand the case to the superior court for further proceedings or simply reverse the superior court. In either instance, the supreme court's decision would have no effect upon the issues before the council.

Thus, while one outcome of the supreme court appeal may reduce the *likelihood* that NCES will be able to develop Stage IV, the other possible outcomes would either allow NCES to develop Stage IV (reversal) or have no effect either way (reversal with remand to the superior court). In short, a stay by the council will do very little to advance the cause of judicial economy. On the other hand, if the council rules promptly on the appeal, and the supreme court consolidates the appeals of the superior court's decision and the council's decision, the result will be far greater efficiency.

### Conclusion

The legislature has given the council the jurisdiction to hear appeals from decisions of the division, and the council's rules contemplate expedited consideration and ruling on such appeals. *See, e.g.*, Env-WMC 205.05(a). The Town bears a substantial burden when it asks the council to deprive NCES of its right to a speedy determination of the appeal. The Town has asked the council to assume that the supreme court's decision will dispose of the appeal before the council, but that assumption is




fallacious. When weighed against the prejudice to NCES and its customers, moreover, the Town's proffered justification for a stay is insubstantial indeed.

Accordingly, NCES respectfully requests that the council deny the Town's motion to stay this proceeding.

Respectfully Submitted,

NORTH COUNTRY ENVIRONMENTAL  
SERVICES, INC.,  
By Its Attorneys,  
BROWN, OLSON & WILSON, P.C.


Date: 5-12-03

By:   
Bryan K. Gould, Esq.  
BROWN, OLSON & WILSON, P.C.  
501 South Street  
Concord, NH 03304  
(603) 225-9716

CERTIFICATE OF SERVICE

I hereby certify that the within document was this day forwarded via U.S. Mail, postage prepaid, to Edmund J. Boutin, Esq. and Brenda E. Keith, Esq., Boutin Associates, P.L.L.C., One Buttrick Road, P.O. Box 1107, Londonderry, NH 03053 and to Maureen D. Smith, Senior Assistant Attorney General, Environmental Protection Bureau, Department of Justice, 33 Capitol Street, Concord, NH 03301-6397.

Date: 5-12-03

  
Bryan K. Gould, Esq.

**EXHIBIT A**



THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF ENVIRONMENTAL SERVICES  
WASTE MANAGEMENT COUNCIL

In re: North Country Environmental Services, Inc.  
Standard Permit No.: DES-SW-SP-03-002

Docket #03-05WMC

**AFFIDAVIT OF R. SCOTT SHILLABER, P.E.**

I, R. Scott Shillaber, being under oath, state that the following facts are true to the best of my knowledge and belief:

1. I am an engineer with Sanborn, Head and Associates. I have had primary responsibility for the design of Stage III and the proposed Stage IV of the landfill owned by North Country Environmental Services, Inc. ("NCES") in Bethlehem, New Hampshire. I have personal knowledge of the facts set forth herein.
2. NCES is currently accepting waste generated in more than sixty New Hampshire towns for disposal in Stage III of the landfill, and there are no other cells at the landfill currently available for disposal of additional solid waste.
3. Under its DES permit, Stage III is scheduled to be at capacity in June of 2005.
4. The New Hampshire Department of Environmental Services, Waste Management Division, has issued a standard permit for the Stage IV expansion of the landfill, but the decision to issue the Stage IV permit is under appeal to the Waste Management Council.
5. To ensure timely completion of Stage IV and uninterrupted receipt of waste at the landfill, NCES must commence construction of Stage IV in the Fall of 2003, with the majority of the work being completed in

the Spring and Summer of 2004, and it must begin depositing the first, non-puncturing layer of waste in Stage IV by November 2004. Attached to this affidavit is a timeline for approvals, construction, and operation of Stage IV.

Further affiant sayeth naught.

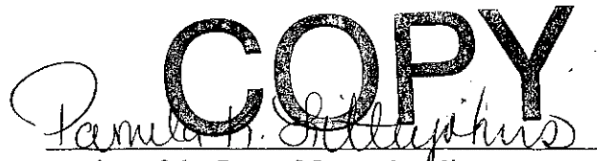
Dated: May 12, 2003

**COPY**  
  
R. Scott Shillaber, P.E.

STATE OF NEW HAMPSHIRE  
COUNTY OF MERRIMACK, SS.

Personally appeared the person signing the above affidavit, and swore that it is true to the best of his knowledge and belief.

Dated: May 12, 2003

**COPY**  
  
Justice of the Peace/Notary Public

PAMELA K. LITTLEJOHNS, Notary Public  
My Commission Expires June 20, 2008

**NORTH COUNTRY ENVIRONMENTAL SERVICES, INC. LANDFILL  
DEVELOPMENT SCHEDULE**

	2003												2004												2005												2006												
	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	
STAGE III OPERATIONS																																																	
STAGE IV PERMITTING (Assumed)																																																	
New Hampshire Department of Environmental Services (Solid Waste Permitting)																																																	
New Hampshire Department of Environmental Services (Type II Permit Modification)																																																	
New Hampshire Department of Environmental Services (Notice of Intent to Construct)																																																	
STAGE IV CONSTRUCTION																																																	
Stage IV Phase I																																																	
STAGE IV OPERATION																																																	
Begin Landfilling in Stage IV Phase I																																																	

NOTES: 1) Fundaments represented above are predicated on assumptions for when permits will be received.  
2) Landfilling will need to begin in Stage IV prior to Stage III being at capacity.